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SUBJECT: DISORDER IN THE COURT: CHIEF JUSTICE ANDREW LI
ANNOUNCES EARLY RETIREMENT FROM COURT OF FINAL APPEAL

REF: 08 HONG KONG 1318

Classified By: Acting Consul General Christopher Marut for reasons 1.4(b) and (d).

11. (C) Summary: Hong Kong was rocked by Court of Final Appeal Chief Justice Andrew Li's decision, announced at a September 2 press conference, to retire next August, four years earlier than the mandatory age for retirement. Li has led Hong Kong's judiciary through the crucial transition period since the handover, and the judiciary is seen by many as the most solid bulwark upholding Hong Kong's autonomy, rule of law, and human rights. Vice President Xi Jinping's July 2008 remark that "there should be mutual understanding and support" among the three branches of Hong Kong's government and a drumbeat of "scholarly" articles criticizing the power of the bench to interpret Hong Kong law initially led many to fear that external factors caused Li's resignation. However, most have come to accept Li's explanation that he wishes to clear the way for a new Chief Justice to oversee the transition as a number of aging senior justices approach retirement. Li's replacement will be nominated by the Chief Executive and "endorsed" by the Legislative Council (LegCo). However, the terms of the Basic Law appear to bind both of them to accept the recommendation of the independent Judicial Officers Recommendation Commission, which Li himself chairs. While there was some initial push from the pan-democrats for LegCo to have the chance to question the nominee, Hong Kong's legal community and even pan-democratic Legal Functional Constituency legislator Margaret Ng quickly reaffirmed the independence from politics of Hong Kong's judicial nomination process. End summary.

12. (C) Comment: Whatever his view of the judiciary's role in checking the government, we cannot picture Chief Executive Donald Tsang would seek Li's retirement, particularly now given his coming battle with the pan-democrats over constitutional reform. If anything, Li's retirement will create an air of uncertainty about Hong Kong's rule of law that may lead the public to support the pan-democrats' efforts to lock in a roadmap on universal suffrage elections (septel). Similarly, while the central government doesn't understand the role and power of the judiciary in Hong Kong, we believe they are sufficiently aware that the judiciary is a bellwether for "one country, two systems" for observers both in Hong Kong and abroad, and would not risk pushing Li to take such a drastic step at an already sensitive time. There are enough legal professionals among Hong Kong's bench and bar enjoying cross-spectrum esteem that we expect the eventual nominee to be confirmed without serious opposition. End comment.

End of an Era

13. (C) On July 1, 1997, Andrew Li Kwok-nang became the first

Chief Justice of the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region. As such, he has been head of the judiciary during a crucial period during which many feared Hong Kong's judicial independence and rule of law might be at risk from interference from the central government. Those fears have not come to pass: with the notable exception of the 1999 "right of abode" case, in which the Hong Kong government petitioned a reluctant National People's Congress Standing Committee to issue an interpretation of the Basic Law overturning a CFA ruling, the judiciary has functioned independently. Public opinion polls indicate the judiciary enjoys greater public trust than any other branch of government, and Li is widely credited with ensuring the bench remains strong and vital.

14. (C) Thus, it was a shock when Li announced September 2 that he would be retiring August 31, 2010. Li will be only 61 when he steps down, four years earlier than normal retirement (Li also could likely easily have won extensions of service through his seventieth birthday). His stated reason was that, as the other permanent CFA justices and a majority of the High Court's justices will retire in the next five years, he wished to clear the way for his replacement to oversee this transition.

15. (C) Given the coming debate over constitutional reform, Xi Jinping's July 2008 remarks calling for Hong Kong's three branches of government to work harmoniously (taken as an indirect challenge to judicial review of government legislation), and rumors of Beijing's unhappiness with the Hong Kong judiciary's independence, many feared that Li was under some external pressure to resign. Senior Counsel and

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Civic Party Leader Audrey Eu Yuet-mee, who was Li's first apprentice barrister, wrote an open letter to Li in respected Ming Pao questioning why Li, full of health and vitality and a "workaholic", would choose to retire early. Eu concluded her "letter" by accepting Li's explanation, albeit with regret, and mainstream Hong Kong opinion has followed. The South China Morning Post and Ming Pao editorial pages, as well as respected centrist commentators Frank Ching and Joseph Wong, have urged putting aside conspiracy theories in favor of focusing on replacing Li with someone who will continue his work of tending to the development and independence of Hong Kong's judiciary.

Naming a Successor

16. (C) Article 88 of the Basic Law states "judges to the courts of Hong Kong shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession, and eminent persons from other sectors." For permanent CFA justices (as allowed by Article 82, one seat on the five-member CFA bench is normally filled by a visiting justice from another common law jurisdiction, usually Australia) and the Chief Justice of the High Court, the nominee must also receive "endorsement" from the Legislative Council (LegCo). Immediately following Li's announcement, several pan-democrats, including Civic Party barristers Audrey Eu and Ronny Tong Ka-wah, were quoted as suggesting LegCo should have the chance to meet the nominee prior to the vote. Hong Kong's legal community reacted strongly against what it saw as a trespass on the independence of the judicial nomination process. Even Civic Party Legal Functional Constituency Legislator Margaret Ng Ngoi-ye stressed that Basic Law Article 90 granted LegCo a vote to endorse (or not) the nominee, without the power to conduct a U.S.-style confirmation hearing.

17. (C) The body executing Article 88 is the Judicial Officers Recommendation Commission, of which Chief Justice Li is ex officio chair and Secretary for Justice Wong Yan-lung (a

reputed Li protege tipped by some as a possible successor) is an ex officio member. As explained to us by Margaret Ng, this body will recommend a single name to the Chief Executive for Chief Justice. She interprets the "shall be appointed" language to imply the Chief Executive is bound to then refer that person to LegCo without challenge (not, to our eye, proven from the language). For its part, LegCo has in past determined that, when notified of the coming appointment, the House Committee (akin to a Congressional Rules Committee) would appoint an ordinary subcommittee to review the relevant paperwork for completeness. Absent some unusual circumstance, LegCo would inform the Chief Executive all was in order, after which the Government would table a resolution for an up-or-down majority vote by LegCo. The appointment is then reported for the record to the National People's Congress, who do not have any active role in the process.

18. (C) In accordance with Article 90 the Basic Law, the Chief Justice must be a Chinese citizen permanently resident in Hong Kong with no right of abode in another country. S/he must be either a sitting judge or a lawyer with ten years' work experience in Hong Kong. Li himself was a barrister at law and Executive Council member when he received the nomination.

MARUT